

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

99.6594

**MECHANICAL CONTRACTORS
ASSOCIATION OF MEMPHIS, INC.,
WHITE PLUMBING & MECHANICAL
CONTRACTORS, INC., and MORGAN &
THORNBURG, INCORPORATED**

Plaintiffs,

NO. _____

VS

**SHELBY COUNTY, TENNESSEE,
CAROLYN S. WATKINS and JOHN &
JANE DOES 1-15,**

Defendants.

COMPLAINT

Plaintiffs file this lawsuit for damages and to enjoin Defendants' unconstitutional and unlawful use of race-based preferences in awarding government construction contracts, and to recover all costs, fees, and expenses related thereto.

THE PARTIES

1. Plaintiff Mechanical Contractors Association of Memphis, Inc. ("MCAM") is a corporation organized under the laws of the State of Tennessee, with a principal place of business at 6263 Poplar Avenue, Suite 1035, Memphis, Tennessee 38119.

2. MCAM is an association of approximately eighteen mechanical contractors who as prime and subcontractors are dedicated to providing quality installation of plumbing, mechanical,

and heating, ventilating, and air conditioning systems for commercial and industrial facilities in the western Tennessee, northern Mississippi, and eastern Arkansas areas. MCAM opposes any unjust and/or illegal rule, regulation, law, plan or program that allows government to unlawfully award contracts to any firm based in whole or in part on the basis of the race or gender of its owner(s). MCAM is funded by its members by their contribution to the “industry fund”. The member contributions are based on the number of hours worked by each member’s employees.

3. MCAM exists to foster, promote, and protect the common interests of its members. MCAM, for example, undertakes labor negotiations on behalf of its members, provides educational opportunities to its members, and works with state and local agencies that regulate the installation of plumbing, mechanical, and heating and air conditioning ventilation systems. Many of Plaintiff’s members bid on public work including work of the Defendant, Shelby County. MCAM’s members have bid on County work as prime contractors and as subcontractors. MCAM will show that because of the Defendants’ race conscious ordinance its member’s bids have been treated unconstitutionally on certain projects. Plaintiff’s members desire to bid on Shelby County projects and should not be excluded from participation in County projects based on an unlawful race-based program.

4. MCAM and its members have a legitimate and substantial interest in the constitutional right at issue in this proceeding and in having the Defendants perform their lawful duties. MCAM’s members are in the class of persons directly and beneficially interested in Defendants’ faithful performance of their legal duty. Accordingly, MCAM brings this action for and on behalf of itself and its members.

5. Plaintiff, White Plumbing & Mechanical Contractors, Inc. (“White Plumbing”) is a corporation duly authorized and doing business as a plumbing and mechanical contracting company in Shelby County Tennessee with principal offices located at 2065 Fletcher Creek Drive, Memphis, Tennessee. White Plumbing is a member of MCAM. White Plumbing is a duly qualified and unlimited licensed contractor by the Tennessee Licensing Board for Contractors.

6. The principal owner of White Plumbing is a Caucasian Female.

7. Plaintiff, Morgan & Thornburg, Incorporated (“Morgan & Thornburg”) is a corporation duly authorized and doing business in Shelby County Tennessee with principal offices located at 4076 Hatcher Circle, Memphis, Tennessee. Morgan & Thornburg is a member of MCAM. Morgan and Thornburg is a duly qualified and unlimited licensed contractor by the Tennessee Licensing Board for Contractors.

8. Defendant Shelby County, Tennessee (“Shelby County”) is a political subdivision organized under the laws of the State of Tennessee. Shelby County may be served with process upon its Mayor, the Honorable Lee Harris, 160 North Main Street, Memphis, Tennessee 38103.

9. Upon information and belief, Defendant, Carolyn S. Watkins, is employed by Shelby County as the Administrator of the Shelby County Government Office of Equal Opportunity Compliance and is responsible for execution and enforcement of the Shelby County MWBE program and related ordinances, policies and procedures that were unconstitutionally implemented in Shelby County as hereinafter described. Carolyn S. Watkins is sued in both her individual and official capacities.

10. Defendants John & Jane Does 1-15 (“John & Jane Does”) are the individual members of the Shelby County Board of Commissioners that adopted and thereafter have implemented the Ordinances and Programs at issue in this lawsuit.

JURISDICTION & VENUE

11. This civil action is a case of actual controversy between the Plaintiffs and Defendants, which arises under the Constitution and laws of the United States and may be finally adjudicated as between the parties. The rights here sought to be redressed are rights guaranteed by the Fourteenth Amendment to the United States Constitution, and 42 U.S.C., Sections 1981, 1983, and 2000(d).

12. Jurisdiction is conferred upon this Court by 28 U.S.C., Section 1331 and 1343(3) and (4). Rule 57 of the Federal Rules of Civil Procedure and the Declaratory Judgment Act, codified at Title 28, United States Code, Sections 2201 through 2202, further empower this Court to award declaratory relief.

13. This civil action is further based on the Defendants’ violation of Tenn. Code Ann. § 5-14-108 that requires competitive bidding. The Court has jurisdiction of this claim pursuant to the Court’s supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a).

14. This Court has personal jurisdiction over Shelby County because Shelby County is subject to general jurisdiction in the State of Tennessee.

15. This Court has personal jurisdiction over Carolyn S. Watkins and John and Jane Does because they committed relevant acts within Tennessee.

16. This is the proper venue for this lawsuit pursuant to Title 28, United States Code, Section 1391(b) because most of the events giving rise to this lawsuit occurred in this District and Division.

INTRODUCTION

17. In or around March 2007, Shelby County adopted Ordinance No. 324: Locally Owned Small Business Purchasing Program (the “Small Business Program”), a race neutral ordinance. Upon information and belief, the purpose of the Program was to promote the employment and utilization of qualified small businesses in Shelby County bidding on and securing contracts with Shelby County. Ordinance No. 324 is codified at Shelby County Municipal Code Section 2-224, as amended (collectively, “Section 224”). Section 224 is attached as Exhibit 1.

18. At the end of 2016, allegedly in response to a Disparity Study, hereinafter described, Shelby County passed Ordinance No. 472: Ordinance to Establish the Shelby County Minority and Woman Business Enterprise Program and to Amend Current Shelby County Purchasing Procedures. Ordinance 472 is codified at Shelby County Municipal Code Section 2-225, as amended (collectively, “Section 225”). Section 225 is attached as Exhibit 2.

19. In August 2018, Shelby County amended Ordinance 472 and Municipal Code Section 2-225 with the passage of Ordinance 489. Ordinance 489 is attached hereto as Exhibit 3.

20. In December 2018 Shelby County again amended Ordinance 472 and Municipal Code Section 2-225 with the passage of Ordinance 500. The text of Ordinance 500 as contained in the official minutes of the Shelby County Commission is attached hereto as Exhibit 4.

21. Collectively Section 225 as amended by Ordinances 489 and 500 is collectively referred to as the “MWBE Program”.

22. Specific to this lawsuit, the MWBE Program uses race-based preferences in awarding government construction contracts and establishes an un-level playing field for non-MWBE contractors.

23. The MWBE Program is unconstitutional and unlawful for both prime and subcontractors. Plaintiffs respectfully ask the Court to declare it as such, and to enjoin Shelby County from further implementing or operating under it with respect to awarding government construction contracts.

FACTUAL BACKGROUND

24. Plaintiffs incorporate and re-allege all preceding paragraphs.

25. The Defendant County has a history regarding its enactment of ordinances requiring race-based construction contracting. The Defendant established ordinances in 1983 and 1986 wherein the Defendant would award contracts based on race. On or about October 21, 1988, the Defendant’s race based construction program was challenged in this Court by the Associated General Contractors of Tennessee, Inc in docket number 88-2834-4/A and assigned to the Honorable Robert M. McRae. This Court through Judge McRae could not find any justification for the Defendant’s race based contracting program. On August 9, 1990 this Court entered an order enjoining the Defendant, Shelby County, from using any type of race-based preferences or criteria in the administration of its contracting procedures.

26. Approximately six months later on January 7, 1991, the Defendant, Shelby County, passed Ordinance 84 which adopted a new contracting and purchasing program designed so that those contractors desiring to do business with the County had to employ at least 90% of the percentage of minorities in the civilian labor force in the business geographical area. On January 9, 1992 this Court entered its order finding the ordinance in violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and ordering the Defendant to eliminate all race based preferences and criteria from the ordinance.

27. The Defendant on or before 1994, in concert with other agencies in the Memphis area contracted with D.J. Miller and Associates from Atlanta, Ga. to perform a study and determine if any disparities existed between minority contractors/subcontractors and non-minority contractors/subcontractors in county construction contracts and other related services as a purported basis for new race-based programs. The Study concluded that statistical disparities did exist. However, the study was flawed as to methodology and the County withdrew its attempt to establish a race-based program as part of a settlement.

28. The foregoing history regarding Shelby County's actions evidences an intent on the part of the Defendants to impose some form of race conscious construction contracting program regardless of standards and guidelines established by the U. S. Supreme Court and later cases involving race criteria in public contracting.

29. On June 19, 2014 the Board of County Commissioners ("County Commission") met and approved a resolution for the purpose of issuing a Request for Qualifications (RFQ) to qualified firms designed to secure the employment of special counsel and/or a consultant to conduct a legal analysis in the form of a disparity study to "determine whether there is need to

develop or modify existing procurement activities in order to ensure that all businesses have a full and adequate opportunity to participate in Shelby County's procurement and contracting processes ...” and “to create programs that will increase diversity with businesses and/or firms doing business with Shelby County Government, that is consistent with local, state and federal laws....” The RFQ did not require the study to identify any discrimination in the existing contracting process or outcomes.

30. The resolution of the County Commission was approved and subsequently signed by Mayor Mark H. Luttrell, Jr. on June 27, 2014.

31. As a result of the subject resolution and at the expense of Shelby County taxpayers, Mason Tillman Associates, LTD, (“MTA”), a California for-profit MWBE firm, was subsequently commissioned to perform the Shelby County Disparity Study (“Disparity Study”) and advise the County Commission whether there was a legal basis to modify procurement procedures to increase diversity by creating a race conscious program.

32. Plaintiffs allege upon information and belief the Defendant, Shelby County, has never received a formal valid complaint of any discrimination in its construction contracting at any time relevant to this litigation.

33. Given its flawed availability estimates, MTA's Final Report dated March 2016 found there to be a significant underutilization of certain groups of minority businesses in Shelby County government construction contracts.

34. The Disparity Study was to be used to comply with the City of Richmond v. J. A. Croson, 109 S. Ct. 706 (1989), a U. S. Supreme Court decision, which imposed a strict scrutiny

standard for review of any race or gender-based contracting/purchasing requirements of any local or state government or its agency. The Court in Croson imposed strict guidelines to be used in determining if a local or state government or its agency had compelling reason to establish race and/or gender as a criteria in its public purchasing/contracting. The Court in Croson stated a factual predicate had to be established showing identified discrimination to support the implementation of a race or gender-based procurement program.

35. The Disparity Study was fatally flawed in several ways, including unreliable sampling. MTA methodology based availability on various lists of construction firm which were not confined to firms who were qualified, willing and able to procure and perform Shelby County government contracts. The study made no distinction between firms that actually submitted bids demonstrating a desire and willingness to participate versus those that passively appeared on various lists.

36. In calculating availability, the MTA study ignored licensure required by Tennessee construction licensing rules even though it stated it had reviewed the statutes. TCA 62-6-101 et seq. sets forth strict requirements for those desiring to be contractors in the State of Tennessee. Rules promulgated by the Tennessee Licensing Board requires contractors to have classifications and monetary limits on the type and amount of work for which they can bid and contract. Those classifications and monetary limits were totally absent from the disparity study in determining the qualifications of a contractor to bid and contract for specific public work. Additionally, the Study ignored the rules and regulations of the Shelby County Code enforcement regarding qualifications of certain contractors to perform work in Shelby County.

37. The Croson guidelines provided: “Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractor, an inference of discrimination could arise”. The failure of the Study to meet the Croson guidelines renders the Study an illegitimate support for the Defendants’ race base program. The study substituted the nebulous and illegitimate standard of “ready, willing and able” for the legal standard of “qualified, willing and able”. The Study’s definition of “ready” simply meant that if the contractor’s name appeared on various lists. It was considered “ready” without regard to the qualification of the contractor to perform specific work. The Study defines availability of contractors in one place as those who are “ready, willing, and able” and in another place as those contractors who are “willing and able”. The unwillingness of the study to comply with legal standards renders the study fatally flawed and unreliable in all aspects.

38. To be qualified to bid and execute construction contracts in the State of Tennessee, the contractor must have the proper license, classification and monetary limits as issued by the Board of Licensing Contractors. The study intentionally omitted any reference or reliance upon the list of qualified construction contractor established by the Board. The Study references many lists but not the list that could have been acquired from the Board whereupon the Study could compare the qualified minority and non-minority to specific contracts by the Defendant, Shelby County. The Study omitted any information regarding the number of “qualified, willing, and able” minority and non-minority construction contractors but only focuses on dollar amounts awarded.

39. Without waiving other alleged wrongs with the Study, Plaintiffs further allege a major fatal omission of the Study was to analyze the alleged disparity in the context of the

competitive bid policy of the Defendants and the competitive bid statute of the State of Tennessee. The Study fails to explore race neutral reasons as to alleged disparities in revenues between minorities and non-minorities. The Study did not find any evidence the Defendant, Shelby County, issued any contract in contradiction to the competitive bid policy of the Defendant, Shelby County. Additionally, the Study found the Defendant, Shelby County, through its purchasing department had acted in a professional manner. Plaintiffs allege and believe the failure of minority contractors to receive more of Defendant's dollars in purchasing and contracting is simply the failure of the minority contractor to be the lowest and best bidder. Further, the Defendant, Shelby County, has a bid protest policy wherein any bidder who has been harmed can file a bid protest. The study conspicuously omits reference to any bid protest by any contractor because of discrimination. The study fails to show any contracting by the Defendant, Shelby County, in violation of its competitive bidding policy because of race, gender, ethnicity, etc. but recommends a race conscious plan, not to address alleged discrimination, but to promote diversity.

40. The Study methodology is further flawed in its failure to examine "particular services" as required by Croson. The Study failed to separate different types of construction services by treating the construction industry as a single, undifferentiated trade, when in reality it is actually composed of firms in very different specialties providing very different services. One example would be the services of a street paving contractor from those of a contractor building a fire station. The mismatching of revenues among different types of construction, services, or goods procured by the Defendant, Shelby County, is flawed methodology inconsistent with the Croson guidelines.

41. The Disparity Study also relied on partial subcontracting records maintained by select construction firms, as opposed to more comprehensive records maintained by Shelby County and prime contractors. A disparity study commission by the City of Memphis and completed in 2010 found and concluded there was an over-utilization of African-American owned construction subcontractors. Plaintiffs assert appropriate records exist for a comprehensive analysis of minority participation in construction subcontracting in the Memphis market.

42. Still further, the Disparity Study relied on anonymous anecdotal evidence regarding the use of minorities in government contracting. This anecdotal evidence was sourced from a public meeting and interviews with unidentified business owners. The Disparity Study did not independently confirm the accuracy of any of its anecdotal evidence, nor the accuracy of other inherently unreliable data on which it relied, such as voluntary online surveys.

43. Respondents to surveys were not representative of firms that MTA claimed to be available or of firms that actually participated in the Shelby County procurement process.

44. The Disparity Study failed to properly determine whether the disparities supposedly identified were caused by factors other than discrimination.

45. In spite of all of this, the Disparity Study was used as a factual predicate to adopt—and thereafter implement—the MWBE Program that unlawfully mandates construction contracting preferences based on race at the expense of non-MWBE firms and taxpayers. Despite the aforementioned reasons regarding the fatally flawed study, the county by and through John and Jane Does 1-15 passed the MWBE Program that took effect in January 2017.

46. With respect to construction contracts, the MWBE Program provides three race-based “remedies” to create an un-level playing field including bid discounts, subcontracting goals that benefit only African-American subcontractors and prime construction contracts valued at less than \$5,000.00 or less giving preference to African-American and Asian prime contractors.

47. Notably, the MWBE Program does not place any limit on the size of construction firms to which it applies. The MWBE Program was adopted in conjunction with the previously implemented Small Business Program. The Small Business Program is limited to construction firms with average annual total sales or receipts of less than \$5 million per year for a three-year period. (Section 224, p. 1, ¶ (a)(1).) The MWBE Program neither adopts this limitation nor implements its own. As a result, construction firms that qualify for the Small Business Program are often excluded from the MWBE Program, and vice versa creating a windfall for large MWBE contractors.

48. Ultimately, the MWBE Program falls far short of its claim to “ensure that county contracts are awarded in a manner that promotes economic inclusion of all segments of the business population regardless of race” (Section 225, p. 3, ¶ (d).)

49. The Disparity Study does not establish the constitutionally required compelling interest for the MWBE Program’s race-based “remedies,” in whole or in part as *Croson* requires before the extreme measure of using race conscious measures can be employed.

50. The Disparity Study fails to establish any pattern of deliberate exclusion of minorities from the contracting process.

51. In addition, none of the race-based “remedies” are narrowly tailored so as to otherwise survive constitutional scrutiny, not in whole or in part. Instead, the race-based “remedies” openly discriminate in both form and substance, as well as in practice and application.

52. It is further alleged that Defendants administer the MWBE program in an unfair and arbitrary fashion, failing to follow its own rules in a fair and consistent fashion.

53. Individual Plaintiffs and MCAM members have in the past sought work as subcontractors on Shelby County construction projects by submitting quotes to prime contractors but have been denied those contracts as a direct result of MWBE racial preferences. Because of the MWBE Program, the individual Plaintiffs and MCAM’s members are unable to effectively compete and bid on construction contracts. They have lost—and will continue to lose—business opportunities, as well as opportunities to grow their goodwill and reputation.

54. The MCAM and its members have been disproportionately impacted by the MWBE program. Upon information and belief, it is alleged that as a direct result of the policies promulgated by the MWBE Program, a largely disproportionate share of the construction dollars awarded for mechanical subcontracts have been awarded to a single multi-million dollar per year African American mechanical contractor.

55. On or about July 24, 2018, White Plumbing in combination with another sub-contractor, submitted a quote to Turner Construction Company, a prime contractor that was in the process of submitting a bid to Shelby County for the Shelby County Health Department construction contract. White Plumbing submitted a lower bid than Gipson Mechanical Contractors (Gipson), a MWBE sub-contractor who was awarded the sub-contract by Turner Construction

Company who prevailed as the prime contractor in the bidding process. Upon information and belief, the White Plumbing bid was the lowest and best bid for the plumbing and mechanical subcontract. As a result, Shelby County taxpayers were charged approximately \$400,000.00 more to complete the project.

56. The actions of the Defendants, jointly and severally, by implementation of the MWBE Program caused White Plumbing to sustain compensatory damages including lost profits in an amount to be determined.

57. Morgan and Thornburg have in the past sought work as subcontractors on Shelby County construction projects by submitting quotes to prime contractors but have been denied those contracts as a direct result of MWBE racial preferences. Because of the MWBE Program, Morgan and Thornburg is unable to effectively compete and bid on construction contracts. They have lost—and will continue to lose—business opportunities, as well as opportunities to grow their goodwill and reputation.

58. Plaintiffs further allege that as a direct result of the unconstitutional MWBE program and its participation requirements, the Plaintiffs have sustained additional damage related to the added burden and cost incurred during the preparation of construction bids for Shelby County contracts.

59. The losses to MCAM's members, in turn, negatively impact MCAM's financials (e.g., the non-payment of dues/fees by struggling members), as well as MCAM's goodwill and reputation (e.g., its ability to attract new members).

COUNT 1 – VIOLATION OF SECTION 1981

60. Plaintiffs incorporate and re-allege all preceding paragraphs.

61. Title 42, United States Code, Section 1981 “proscribe[s] discrimination in the making or enforcement of contracts against, or in favor of, any race.” *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 (1976).

62. The MWBE Program discriminates on the basis of race with respect to the making and enforcement of contracts, namely, government construction contracts.

63. Accordingly, in adopting and thereafter implementing the MWBE Program, the Defendants have violated and continues to violate Section 1981.

64. As a result of Shelby County’s violations, individual Plaintiffs and MCAM and its members have suffered and continue to suffer harm, including harm for which there is no adequate remedy at law and harm that is otherwise difficult to quantify or measure. Plaintiffs, therefore, are entitled to injunctive relief and to their “costs, including attorney’s fees and expert fees.” *See* 42 U.S.C. §§ 1988(b), (c).

65. Finally, Defendants, Carolyn S. Watkins, John and Jane Does knew (or should have known) from the inception that the MWBE Program unlawfully discriminated on the basis of race and violated well established constitutional principles. Therefore, Carolyn S. Watkins, John and Jane Does are not entitled to qualified immunity and should be individually held jointly and severally liable with Shelby County.

COUNT 2 – VIOLATION OF SECTION 1983 (FOURTEENTH AMENDMENT)

66. Plaintiffs incorporate and re-allege all preceding paragraphs.

67. Title 42, United States Code, Section 1983 provides a private right of action to individuals who are deprived of any rights, privileges, or immunities protected by the Constitution.

68. As alleged in Count 1, the Defendants are guilty of violating and continue to violate Title 42, United States Code, Section 1981, enforceable under Title 42, United States Code, Section 1983.

69. As alleged in Count 3, the Defendants are guilty of violating and continue to violate Title 42, United States Code, Section 2000d, enforceable under Title 42, United States Code, Section 1983.

70. The Fourteenth Amendment to the Constitution forbids a state actor, like Shelby County, from “deny[ing] to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend XIV, § 1.

71. The MWBE Program, official policies and ordinances enumerated herein discriminate on the basis of race and deny persons within Shelby County equal protection of the laws.

72. The MTA Disparity Study does not provide a constitutionally sufficient justification by demonstrating a compelling interest for the MWBE Program.

73. In addition, the MWBE Program is not narrowly tailored nor is it the least restrictive means for addressing alleged racial disparities in Shelby County government construction contracts.

74. Accordingly, in adopting and thereafter implementing the MWBE Program, Defendants have violated and continue to violate the Fourteenth Amendment.

75. As a result of Defendants' violations, individual Plaintiffs, MCAM and its members have suffered and continue to suffer harm, including harm for which there is no adequate remedy at law and harm that is otherwise difficult to quantify or measure. Plaintiffs, therefore, are entitled to injunctive relief and to their "costs, including attorney's fees and expert fees" pursuant to 42 U.S.C. §§ 1988(b), (c).

76. The individual Plaintiff, White Plumbing, is also entitled to compensatory damages for lost profits and other monetary damages suffered as a result of subcontracts previously illegally awarded to another sub-contractor as a result of the MWBE Program and the ordinances and policies of the Defendants.

77. Defendants knew or should have known that their actions were in clear violation of well-established constitutional law.

78. Defendants, Carolyn S. Watkins and John & Jane Does knew (or should have known) that the MWBE Program lacked a constitutionally sufficient justification, and that the MWBE Program is not the least restrictive means for addressing racial disparities. As a consequence, Carolyn S. Watkins and John & Jane Does are not entitled to qualified immunity and should be individually held jointly and severally liable with Shelby County.

COUNT 3 – VIOLATION OF 42 U.S.C. SECTION 2000(d)

79. Plaintiffs incorporate and re-allege all preceding paragraphs.

80. Plaintiffs further allege, upon information and belief, that some of the Shelby County Construction Contracts awarded under the MWBE Program were at least in part funded by money received from the United States Government.

81. The violations heretofore enumerated hereinabove therefore constitute violations of 42 U.S.C. § 2000(d) (1964) that prohibits discrimination based upon race in contracts funded, in whole or in part by the United States Government. The statute states as follows:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

82. Accordingly, in adopting and thereafter implementing the MWBE Program, Defendants have violated and continue to violate 42 U.S.C. § 2000(d).

83. As a result of Defendants' violations, individual Plaintiffs, MCAM and its members have suffered and continue to suffer harm, including harm for which there is no adequate remedy at law and harm that is otherwise difficult to quantify or measure. Plaintiffs, therefore, are entitled to injunctive relief and to their "costs, including attorney's fees and expert fees" pursuant to 42 U.S.C. §§ 1988(b), (c).

84. The individual Plaintiff, White Plumbing, is also entitled to compensatory damages for lost profits and other monetary damages suffered as a result of subcontracts previously illegally awarded to another sub-contractor as a result of the MWBE Program and the ordinances and

policies of the Defendants that Defendants knew or should have known to be in clear violation of well-established law.

COUNT 4 – VIOLATION OF TENN. CODE ANN. § 5-14-108

85. Plaintiffs incorporate and re-allege all preceding paragraphs.

86. The actions of the Defendants enumerated hereinabove constitute violations of the Tennessee County Purchasing Law of 1957 and specifically Tenn. Code Ann. § 5-14-108(a)(1) that states:

All purchases of and contracts for purchases of supplies, materials, equipment and contractual services, and all contracts for the lease or rental of equipment, and all sales of county-owned property that has become surplus, obsolete or unusable, shall be based wherever possible on competitive bids.

87. Implementation of the Shelby County MWBE program forces the award of contracts to bidders other than the most competitive bidder in violation of Tenn. Code Ann. § 5-14-108(a)(1).

88. As a result of Defendants' violations, individual Plaintiffs, MCAM and its members have suffered and continue to suffer harm, including harm for which there is no adequate remedy at law and harm that is otherwise difficult to quantify or measure. Plaintiffs, therefore, are entitled to injunctive relief and to their "costs for violation of state law.

89. The individual Plaintiff, White Plumbing, is also entitled to compensatory damages for lost profits and other monetary damages suffered as a result of subcontracts previously illegally awarded to another sub-contractor as a result of the MWBE Program in violation of state law.

PRAYER FOR RELIEF

90. Plaintiffs incorporate and re-allege all preceding paragraphs.

91. The MWBE Program violates federal law and cannot survive constitutional scrutiny. For these reasons and those set forth above, Plaintiffs respectfully pray for the following relief:

a. An order declaring unlawful the MWBE Program and Shelby County Municipal Code Section 2-225, as amended, pursuant to 28 U.S.C. § 2801 and Fed. R. Civ. P. 57;

b. An order declaring unconstitutional the MWBE Program, and Shelby County Municipal Code Section 2-225, as amended, pursuant to 28 U.S.C. § 2801 and Fed. R. Civ. P. 57;

c. An order enjoining all Defendants from further implementing or operating under the MWBE Program and/or Shelby County Municipal Code Section 2-225, as amended, with respect to awarding government construction contracts;

d. Judgment awarding all costs, attorney fees, and expenses incurred by Plaintiffs in readying, bringing, and prosecuting this lawsuit pursuant to 42 U.S.C. § 1988 and Fed. R. Civ. P. 54(d);

e. Judgment holding jointly and severally liable Shelby County, Carolyn S. Watkins and John & Jane Does in their individual and official capacities;

f. Judgment awarding compensatory damages to the individual Plaintiff, White Plumbing and Mechanical Contractors, Inc. in an amount not less than \$500,000.00.

g. Any additional relief the Court deems warranted under the circumstances.

January 17, 2019.

Respectfully submitted,

**McNABB, BRAGORGOS, BURGESS &
SORIN, PLLC**

s/Nicholas E. Bragorgos

NICHOLAS E. BRAGORGOS #12000

JOHN BARRY BURGESS #07255

Attorneys for Mechanical Contractors

Association of Memphis, Inc., White

Mechanical Contractors, Inc. and Morgan &
Thornburg Incorporated

81 Monroe, Sixth Floor

Memphis, Tennessee 38103

Telephone: (901) 624-0640

Fax: (901) 624-0650

nbragorgos@mbbslaw.com

bburgess@mbbslaw.com

Sec. 2-224. - Locally owned small business purchasing program.

The board of county commissioners may establish by ordinance special purchasing procedures for at least 20 percent of the annual purchases of goods and services by the Shelby County Government to be awarded to locally-owned small businesses.

- (a) *Definitions.* The following words, terms and phrases, when used in this section, shall have the meanings ascribed to them in this subsection, except where the context clearly indicates a different meaning:

Business shall mean and include individuals, sole proprietorships, unincorporated groups or associations, partnerships, corporations, joint ventures, and every other form of business entity.

Commercially useful function shall mean the fulfillment of a subcontract by a bidder responsible for the materials, supplies, and services used in the performance of the contract. To determine whether a subcontractor is performing a commercially useful function, the amount of work subcontracted shall be evaluated with respect to normal industry practices including whether the amount the subcontractor is to be paid under the contract is commensurate with the work it is actually to perform. The subcontractor does not perform a commercially useful function if its role is limited to a non-essential participant in a contract through which funds are passed in order to convey the appearance of meaningful and useful subcontractor participation.

Joint venture, consortium, and partnership shall mean a business entity that is formed to contract with Shelby County through the Locally Owned Small Business Purchasing Program. The business entity shall have written documentation demonstrating that the eligible locally owned small business as defined herein has a real, substantial, and continuing ownership interest of at least 51 percent, and shall be responsible for the daily management and control of the project. The business must be a certified locally owned small business.

Locally owned small business means any business:

- (1) Any business with average annual total sales or receipts within its last three fiscal years prior to its application to the Locally Owned Small Business Purchasing Program of less than \$1,000,000.00 a year; except architecture and engineering firms, security companies, computer companies, roofing and contractors and vendors in the construction industry. Any architecture and engineering firm, roofing and contractors and vendors in the construction industry with average annual total sales or receipts within its last three fiscal years prior to its application to the Locally Owned Small Business Purchasing Program of less than \$5,000,000.00 a year; any security company or computer company with average annual total sales or receipts within its last three fiscal years prior to its application to the Locally Owned Small Business Purchasing Program of less than \$15,000,000.00 a year; and
 - (2) Such business shall be headquartered and physically located in Shelby County and owned by one or more residents of Shelby County with a real, substantial, and continuing ownership of at least 51 percent of the business.
 - (3) The business must be eligible to operate in Shelby County and shall be authorized to do so under the laws of the state of Tennessee.
- (b) *Locally Owned Small Business Purchasing Program rules and regulations .*
- (1) The certification process includes the following steps:
 - a. The business shall submit a complete certification application to the equal opportunity compliance office (EOC);
 - b. The EOC shall review the application and make a determination and advise the applicant of eligibility within 30 days of the receipt of the completed application and advise the applicant in writing as to its eligibility. LOSB certificates shall be sent to eligible applicants.
 - c. In the event the EOC determines that the business is not eligible, the written communication to the business shall include a detailed explanation for the denial.



- d. To appeal the denial, the business must submit a written request to the EOC within ten business days of receiving the denial notification.
 - e. If the denial is not reversed, the business may appeal to the chairman of the Board of Commissioners of Shelby County or to a commissioner delegated by the board chairman for a determination. The decision of the board or its designee shall be final.
 - f. Certified businesses must re-certify annually. An application for re-certification must be submitted in compliance with the certification rules.
- (2) The administrator of purchasing in conjunction with the administrator of the EOC shall identify certain goods and services contract opportunities to be set aside for prime contracts valued at \$15,000.00 or less for purchasing from locally owned small businesses. After adhering to all other bidding and purchasing requirements of the county, not inconsistent with this part, if no bids are received from locally owned small businesses, then the county may solicit bids for goods or services from all other sources.
- (3) Locally owned small businesses that are also certified as minority or woman-owned business enterprises shall be counted towards both the locally owned small businesses and minority and woman-owned business enterprise contract goals.
- (4) The administrator of purchasing, in conjunction with the administrator of the equal opportunity compliance office shall annually review the Shelby County Capital Improvement Program to determine projects with a construction cost of \$250,000.00 or more. Subcontracts valued at least ten percent of the construction costs of such project shall be awarded to locally owned small businesses as defined herein, except as set forth in sub-paragraph (vi) of this section, either as part of the conditions of the solicitation for general contractors bidding on these projects, or as separate bids issued by the county for subcontracts that may be assigned to general contractors.
- (5) A contractor's failure to meet the locally owned small business subcontractor goal at bid opening shall be grounds for rejecting the bid unless the contractor can show evidence of a good faith effort. Good faith effort elements are quantified to determine whether a prime contractor has made an effort to meet the locally owned small business contract goals. In order to be considered a responsive bidder, the prime contractor must achieve a minimum score of 80 points to demonstrate a sufficient good faith effort. The point assignment and requirements to document evidence of good faith efforts are as follows:
- a. *Advertising (five points)* : Opportunities for locally owned small businesses shall be advertised in three print or digital media outlets during the three weeks prior to the bid opening. A subcontracting opportunity must be published in general circulation media, multicultural-focused media, trade association publications, or trade-related publications, and local publications at least twice, unless the solicitation waives this requirement.
 - b. *Attend the pre-bid meeting (five points)* : Attendance at the pre-bid meetings is mandatory to comply with the good faith effort requirement. The contractor's name on the pre-bid meeting sign-in sheet will serve as documentation.
 - c. *Bidder's outreach to identify locally owned small businesses (15 points)* : Communication with locally owned small businesses through personal, frequent, and persistent contact by promptly returning telephone calls, facsimiles, and emails must be documented. Correspondence logs shall list the names of the businesses, the contacted representatives, and dates of contact. Copies of correspondence with the contacted businesses, including the responses received, shall be provided. Documentation can also include facsimile transmittal confirmation slips or written confirmation of receipt via email with the date of transmission. The contractor shall be required to contact at least three businesses.
 - d. *Contact follow-up (15 points)* : Prompt return of telephone calls, facsimiles, and emails after the initial solicitation is required. The follow-up shall consist of a telephone call, facsimile, or email during normal business hours at least two weeks prior to the bid opening. The prime contractor must maintain correspondence logs that list the subcontractors who were

contacted, including the results of the contact. The log includes the names of the businesses and contact person, telephone number, dates of contact, and notes regarding the outcome of contact. The record shall also identify the scope of work each contacted subcontractor was asked to bid.

- e. *Identify items of work (15 points)* : Subcontracts shall consist of discrete items or projects that locally owned small businesses may find economically feasible to perform. The documentation shall include a list with descriptions of the specific items of work solicited from eligible businesses, as well as notices and advertisements targeting locally owned small business subcontractors.
 - f. *Negotiate in good faith (15 points)* : Validation that bids, quotes, or proposals prepared by eligible businesses based on the subcontractor's standing within its industry or on membership in a specific group, organization, association, or political or social affiliation shall not be unjustifiably rejected. A written statement with names, addresses, and telephone numbers of subcontractors contacted and the negotiated price and services must be submitted. This list shall include dates of the negotiations and the results, and document the bids received from businesses that could provide a commercially useful function.
 - g. *Offer assistance in securing financing, bonding, insurance, or competitive supplier pricing (ten points)* : Locally owned small businesses shall be offered technical assistance regarding plans, specifications, and requirements of the contract in a timely manner to facilitate responses to solicitations. Contractors shall consider a certified LOSB's bid even if the certified locally owned small business cannot obtain a bond, unless lack of subcontractor bonding would cause the prime to lose its own bonding or prevent the prime from obtaining bonding, and should make efforts to assist interested businesses in obtaining financing, bonds, and insurance required by the county, as well as provide competitive pricing. The contractor shall provide a written description of the type of assistance, the company name, contact person, telephone number, the name of the person who provided the assistance, and that of the supplier who offered competitive pricing. So long as the contractor otherwise complies with this paragraph, it shall be entitled to the ten points even if the LOSB is not able to ultimately obtain a bond.
 - h. *Provide timely written notification (20 points)* : Solicitation of subcontract bids and material quotes from relevant locally owned small business shall be submitted in writing at least two weeks prior to the bid opening. Relevant businesses are those that could feasibly provide the goods or services required to satisfy the terms specified in the county's solicitation. When soliciting bids, quotes, and proposals, the contractor must provide the project name, the bidder's name, subcontract items, primary contact person's name and telephone number, information on the availability of plans and specifications, and the date on which the subcontractor's written bid is due to the prime contractor. Written notification will include verification of the transmission date, the recipient's name, and the business name. Documentation can also include facsimile transmittal confirmation slips or written confirmation of receipt via email with the date of transmission.
- (6) Any locally owned small business awarded a subcontract shall not sublet, subcontract, or assign any work or services awarded to it without the prior written consent of the administrator of the EOC.
 - (7) Quotes for prime contracts valued at under \$5,000.00, shall be solicited from locally owned small businesses on construction, professional services, and commodities and services contracts
 - (8) The administrator of purchasing shall identify construction contracts under \$5,000.00, for award to locally owned small businesses. Eligible businesses shall be placed on a rotation list according to their certification date. Businesses shall apply for placement on the list by submitting proof of certification with the county or a reciprocal agency certified with the county. There shall be separate contract rotation lists for each construction specialty. Quotes should be

requested from the next two vendors on the rotation list. The contract should be awarded to the lowest bidder and the second company is then moved to the bottom of the list. In the case of a tie bid the vendor with the earliest certification date shall be awarded the contract. If no locally owned small business is found to be responsive, the bid shall be opened to all available businesses.

- (9) Upcoming contracting opportunities will be reviewed by the administrator of purchasing in conjunction with the administrator of the equal opportunity compliance office to identify items of work that can be unbundled into smaller contracts.
- (10) On informal bid solicitations for purchases valued at \$25,000.00, or less, the administrator of purchasing shall target the solicitations to certified locally owned small businesses. There must be at least three certified locally small owned businesses that provide the goods or services being procured. If no locally owned small businesses is found to be responsive, then the county may solicit bids for the goods or services from all other sources.
- (11) As to those purchases below the requirement for a formal bid solicitation (currently, under \$25,000.00) and not included in the locally owned small business set aside, the administrator of purchasing in conjunction with the administrator of the EOC shall determine if any locally owned small business offers that product or service. If so, at least one such eligible locally owned small business should be included in the vendors contacted for an opportunity to bid, and the administrator of purchasing may designate the award of purchase order for the purchase of such goods and services from the identified locally owned small business.
- (12) The administrator of purchasing in conjunction with the Administrator of the EOC shall provide a preference for locally owned small businesses on competitive low bid solicitations. Said preferences shall not exceed five percent of the lowest possible responsive bidder. The preference shall be applied on a sliding scale in the following manner: A preference of up to five percent shall be allowed for contracts valued at \$500,000.00 and under.
 - a. A preference of up to three percent shall be allowed for contracts greater than \$500,000.00 and under \$1,000,000.00.
 - b. A preference of two percent shall be allowed for contracts greater than \$1,000,000.00.
 - c. For construction contracts over \$2,000,000.000, a two percent preference will be given to the bids of general contractors that meet the requirements of [subsection (a)(2)] and which have locally owned small businesses as subcontractors when such locally owned small businesses collectively have 50 percent of the total prime contract award[;] and
- (13) The administrator of purchasing shall, when feasible, divide a single bid package for any purchase of goods and services into two or more smaller projects. The administrator of purchasing in consultation with the equal opportunity compliance office shall determine when the smaller bid packages may result in a greater number of bids by locally owned small businesses.
- (14) The administrator of purchasing, upon approval of the county commission, may establish special insurance and bonding requirements for certified locally owned small businesses so long as they are not in conflict with the laws of the state of Tennessee.
- (15) As a prequalification criterion, a manufacturer doing business with the county shall document that they have locally owned small business distributors authorized to sell its product line at the regional or national level on contracts valued under \$25,000.00.
- (16) The administrator of purchasing, with the approval of the mayor, shall adopt, promulgate, and may from time to time amend rules and regulations not inconsistent with the provisions of this section effectuate and implement the Locally Owned Small Business Purchasing Program within the intent of this section.
- (17) On a quarterly basis, the administrator of purchasing in conjunction with the administrator of the EOC shall provide to the Mayor and Board of Commissioners of Shelby County a locally owned small business utilization report. The report shall include a summary of the purchases

selected for LOSB participation, as well as a listing of the contracts awarded to locally owned small businesses for the quarter, the total dollar amount of the awarded contracts, and the total amount of purchases for the period.

The locally owned small business utilization reports shall be posted on the Equal Opportunity Compliance webpage. The reports shall be searchable by (1) department, (2) award and payment date, (3) prime contractor and subcontractor ethnicity and gender, (4) certification status, (5) award amount, and (6) industry. Change orders, amendments, and substitutions shall be separately reported by prime contract, department, and industry. Good faith effort waivers to the subcontract goal or failure to meet the subcontract goal shall also be published in the utilization reports. The reports shall be downloadable into Microsoft Word and Excel formats at no cost to the user.

- (18) The Equal Opportunity Compliance webpage shall maintain a directory listing certified locally owned small businesses. The listings shall include the business's name, National Institute of Government Purchasing (NIGP) or North American Industry Classification System (NAICS) code, and the business's contact information. The directory shall be updated monthly to reflect new certifications or changes to existing certifications. The directory shall be downloadable in Microsoft Word and Excel formats at no cost to the user.
- (c) *On-site compliance review inspections.* Upon the submission of a written sworn complaint of noncompliance, the EOC may conduct an on-site inspection or desk audit of the project to determine whether the prime contractor has been utilizing the subcontractor in accordance with the contractual agreement for services. During the investigation period, the payment for services may be temporarily suspended pending the outcome of the investigation. The investigation process may take up to ten business days for completion.
- (d) *Prompt payment to subcontractors .*
 - (1) Payments to prime contractors shall be made within 15 days of the County receiving an undisputed invoice. Prime contractors shall be required to pay their subcontractors within ten days of receipt of their invoice payment from the county. The prime contractor shall be penalized if the subcontractor is not paid in a timely manner. All contracts with prime contractors shall include the following language:

The penalty for noncompliance with the ten-day timely payment to subcontractor(s) shall include:

 - a. Any prime contractor who violates the timely payment term to a subcontractor more than once in a three month period shall lose their EOC qualification number to do future business with the county for three months;
 - b. Any prime contractor who violates the timely payment term to a subcontractor more than twice in a six-month period shall lose their EOC qualification number to do future business with the county for six months;
 - c. Any prime contractor who violates the timely payment term to a subcontractor more than three times in a one-year period shall lose their EOC qualification number to do future business with the county for one-year.

The prime contractor may appeal the above imposed penalty to the EOC Appeals Board.

(Code 1992, § 2-67; Ord. No. 324, §§ 1, 2, 3-26-2007; Ord. No. 388, exh. A, 2-22-2010; Ord. No. 471, §§ 1, 2, 12-19-2016; Ord. No. 474, 6-26-2017)

Sec. 2-225. - Minority Woman Business Enterprise Program.

- (a) *Scope of M/WBE program*. The Equal Opportunity Compliance Office shall manage and monitor the County's utilization of M/WBEs. Specifically, the EOC shall: (1) adopt rules and procedures to implement the M/WBE Program, (2) create, maintain, and distribute the directory of certified M/WBEs, (3) regularly review the progress of each county department, office, board and agency's achievement of the M/WBE goals, (4) ensure that county bids and proposals adhere to the procurement procedures contained herein, (5) monitor all prime contracts with M/WBE goals throughout the duration of the contract to ensure that all efforts are made to comply with goals, and (6) present an annual M/WBE Utilization Report to the Shelby County Board of Commissioners. The EOC shall be adequately staffed with personnel who have the requisite skills, knowledge, and ability to implement the M/WBE Program objectives and responsibilities. The EOC shall collaborate with the purchasing administrator to adopt rules and procedures to implement the M/WBE program.

Routine county-wide training shall be provided to ensure that all personnel are knowledgeable about the M/WBE Program requirements and are capable of supporting the M/WBE Program and its policies and objectives. The training program shall be conducted by the EOC, and the following three training programs shall be implemented:

- (1) *Annual training seminar*. The annual training seminar shall inform staff of any changes to the M/WBE Program policy and procedures and promote the M/WBE Program enhancements. An internal webpage shall be maintained in order to provide assistance, information, and responses to questions posed by county staff.
- (2) *New employee training*. New employee training shall be held by the Equal Opportunity Compliance Office to ensure that new employees understand the established policies and procedures. An electronic copy of the M/WBE Program Training Manual shall be provided to each new County employee.
- (3) *M/WBE Program Training Manual*. An M/WBE Program Training Manual describing the M/WBE Program mission, policy, and procedures shall be available to new staff electronically and shall be available for download on the county's intranet.

(b) *Definitions.*

Award shall mean the selection of a vendor for a contract. Contract awards are made by the county to a prime contractor and by a prime contractor to a subcontractor.

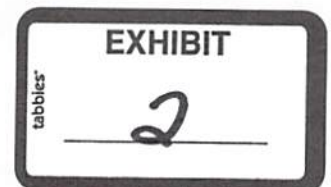
Bidder shall mean any individual, company, or association seeking the award of a contract or subcontract on a project that is at least partially funded by the county.

Commercially useful function shall mean a subcontract fulfilled by a bidder responsible for the materials, supplies, and services used in the performance of the contract. To determine whether a subcontractor is performing a commercially useful function, the subcontracted work shall be evaluated with respect to normal industry practices, including whether the contracted amount that the subcontractor is to be paid is commensurate with the work that it is contracted to perform. The subcontractor does not perform a commercially useful function if its role is limited to being a participant in a contract through which funds are passed in order to convey the appearance of meaningful and useful subcontractor participation.

Contract shall mean a mutually binding legal relationship or any modification thereof obligating the vendor to furnish commodities or services, including construction and professional services, and the county or the county's prime contractor to pay for them.

Control shall mean the authority of an individual or business owner to sign responses to solicitations and contracts, to make price negotiation decisions, to sell or liquidate the business, and to direct the day-to-day business management and operations without interference from others.

Eligible purchase shall mean all purchases made by purchase order or contract excluding those with governmental or non-profit entities, except in bidding situations, for inmate medical services and for



maintenance of computer systems by the original provider of such systems. While these are excluded, every effort will be made to unbundle these excluded goods or services.

Good faith effort shall mean a documentation of the steps taken by a bidder to comply with the M/WBE goals and procedures established by this section and the requirements set forth in the county's solicitations.

Minority business enterprise shall mean a for-profit business enterprise that is 51 percent owned and controlled by one or more minority persons who shall provide proof of being a resident of Shelby County for at least six months prior to the time of the application for certification. The qualifying minority groups are defined by the United States Small Business Administration under 13 CFR 124.103 and the United States Equal Employment Opportunity Commission.

- (1) *African Americans* shall mean persons having origins in any of the Black racial groups of Africa;
- (2) *Hispanic Americans* shall mean persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race;
- (3) *Asian Americans* shall mean persons whose origins are in Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru, or Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal);
- (4) *Native Americans* shall mean persons who are enrolled members of a federally or state-recognized Indian tribe, Eskimos, Aleuts, or Native Hawaiians;

Minority and woman business enterprise availability shall mean the number of minority and/or woman-owned businesses located within the county that are willing and able to provide the commodities and services procured by the county.

Prime contractor shall mean the individual or business that has a contract with the county and that has full responsibility for completing the terms of the agreement.

Race-conscious shall mean any M/WBE Program component whereby the race or gender of the business owner is taken into consideration.

Race-neutral shall mean any M/WBE Program component whereby the race or gender of the business owner is not taken into consideration.

Subcontractor utilization plan shall mean the documentation submitted by a prime contractor at the time of bid opening, listing the subcontractors, sub-consultants, suppliers, or truckers proposed to meet the M/WBE subcontract goals. The subcontractor utilization plan details each business' name, certification status, and percentage of the prime contractor's bid amount.

Subcontractor shall mean an individual or business that has a contract to perform a service or provide materials, equipment, and/or supplies as a part of the scope of work set forth in a prime contract awarded by the county.

User department shall mean the department, office, board, agency, or authorized representative of the county that issues a requisition for a solicitation to procure commodities or services.

Woman business enterprise shall mean a for-profit business enterprise that is 51 percent owned and controlled by one or more women who shall provide proof of being a resident of Shelby County for at least six months prior to the time of the application for certification.

- (c) *M/WBE Program justification.* The 2016 Legal Analysis and Disparity Study documented a statistical disparity in the county's award of construction prime contracts to African American and Asian American businesses. In addition, African American, Asian American, and Hispanic American businesses were found to have a statistical disparity in the county's award of professional services

prime contracts. The study also documented a statistical disparity in the county's award of commodities and services prime contracts to African American and Caucasian Female businesses.

Furthermore, the 2016 Legal Analysis and Disparity Study documented a statistical disparity in the award of construction subcontracts to African American businesses, and professional services subcontracts to African American and Caucasian Female businesses by the county's prime contractors.

The study examined the county's Locally-owned Small Business (LOSB) Program to assess its effectiveness in utilizing available M/WBEs. The analysis documented that the LOSB Program promulgated in 2007 is robust including goals for the utilization of small businesses with gross income five million and under. However this race neutral program has not eliminated the disparity in the use of available M/WBEs documented in the Study.

- (d) *Statement of policy*. It is the policy of the county to take all necessary, reasonable and legal action to prevent discrimination and to ensure that all businesses, including M/WBEs, are afforded the maximum practicable opportunity to participate in the county's contracting process. The M/WBE Program shall be adopted to implement the county's M/WBE Policy in order to remedy the documented statistical underutilization that continues to adversely affect the participation of M/WBE businesses in the awarding of the county's prime contracts and subcontracts. The M/WBE Program shall ensure that county contracts are awarded in a manner that promotes economic inclusion of all segments of the business population regardless of race or gender, in order to maximize the economic vitality and development of the county.

The county shall be committed to promoting fair and open competition for M/WBEs seeking to do business with the county. The county shall also ensure that prime contractors do not discriminate in their solicitation, selection, or treatment of subcontractors.

The county has established goals to ensure that M/WBE utilization on construction, professional services, and commodities and services contracts reflects the level of M/WBE availability. The M/WBE goals are based on the findings of statistically significant underutilization from the 2016 Legal Analysis and Disparity Study.

- (e) *Race and gender-conscious remedies*. The race and gender conscious remedies shall be met by the ethnic and gender groups that were found to have a statistically significant underutilization on the county's prime contracts and subcontracts. Race and gender-conscious subcontract goals, prime bid discounts, and evaluation preference points are the narrowly tailored remedies to address the documented statistical disparity. The subcontract goals are based on minority business enterprise (MBE) and woman business enterprise (WBE) availability.
- (1) The construction subcontract goal shall be 28 percent for MBEs, and the professional services subcontract goal shall be 26 percent for MBEs and 14 percent for WBEs.
 - (2) The construction subcontract goal shall be met by African American businesses and the professional services subcontract goal shall be met by African American businesses and Caucasian Female businesses. The construction subcontract goal shall be applied to requests for bids, and the professional services subcontract goals shall be applied to requests for proposals as well as requests for statements of qualifications. Proof of subcontract participation shall be submitted at the time of bid opening and documented on the subcontractor utilization plan. If a bidder fails to meet the solicitation's subcontract goals, the bidder can provide evidence of a good faith effort to meet the goal. A bid that does not meet the subcontract goals or provide evidence of a good faith effort will be deemed non-responsive and therefore ineligible for award. The subcontractor utilization plan shall be reviewed at the time of bid opening for subcontractor goal compliance, verification of subcontractor certification, and evidence that the subcontractor shall perform a commercially useful function.

Good faith effort elements shall be quantified to determine whether a prime contractor has provided evidence of a good faith effort to meet the M/WBE subcontract goals. In order to be considered a responsive bidder, the prime contractor must demonstrate a sufficient good faith

effort to achieve a minimum score of 80 percent of the required points. The point assignments and requirements to document evidence of good faith efforts are as follows:

- a. Advertising - five points: Opportunities for M/WBEs shall be advertised to certified M/WBEs in three digital media outlets during the three weeks prior to the bid opening. Opportunities for M/WBEs shall only be advertised in print media, if required by statute. A subcontracting opportunity shall be published online in general circulation media, minority-focused media, trade association publications, or trade-related publications at least twice, unless the solicitation waives this requirement.
- b. Attend the pre-bid meeting - five points: Attendance at the scheduled pre-bid meetings shall be mandatory to comply with the good faith effort requirement. The contractor's name on the pre-bid meeting sign-in sheet shall serve as documentation.
- c. Bidder's outreach to identify M/WBEs - fifteen points: Contractors shall communicate with M/WBEs through personal, frequent, and persistent contact by promptly returning telephone calls, facsimiles, and emails. Correspondence logs shall list the names of the businesses, the representatives contacted by the bidder, and dates of contact. Copies of correspondence with the businesses contacted by the bidder, including the responses received, shall be provided. Documentation shall also include facsimile transmittal confirmation slips or written confirmation of receipt via email with the date of transmission. The contractor shall be required to contact at least three businesses.
- d. Contact follow-up - 15 points: Contractors are required to promptly return telephone calls, facsimiles, and emails after the initial solicitation. The follow-up shall consist of a telephone call, facsimile, or email during normal business hours at least two weeks prior to the bid opening. The prime contractor shall maintain correspondence logs that list the subcontractors who were contacted, including the results of that contact. The list shall also include the names of the eligible businesses and of contact persons, as well as telephone numbers, dates of contact, and notes regarding the outcome of said contact. The record shall also identify the scope of work for which each was asked to provide a bid.
- e. Identify items of work - 15 points: Subcontracts shall be broken down into discrete items or packages that M/WBEs may find economically feasible to perform. The documentation shall include a list with descriptions of the specific items of work solicited from eligible businesses, as well as notices and advertisements targeting M/WBE subcontractors.
- f. Negotiate in good faith - 15 points: Contractors may not unjustifiably reject bids, quotes, or proposals prepared by eligible businesses based on the subcontractor's standing within its industry, or on membership in a specific group, organization, association, and/or political or social affiliation. A written statement with names, addresses, and telephone numbers of subcontractors contacted and the negotiated price and services shall be submitted. This list shall include dates of the negotiations and the results, and document the bids received from businesses that could provide a commercially useful function.
- g. Offer assistance in securing financing, bonding, insurance, or competitive supplier pricing - ten points: Contractors shall provide M/WBEs with technical assistance regarding plans, specifications, and requirements of the contract in a timely manner to facilitate responses to solicitations. Contractors may not deny a subcontract solely because a certified M/WBE cannot obtain a bond, and shall make efforts to assist interested businesses in obtaining financing, bonds, and insurance required by the county, as well as provide competitive pricing. The contractor shall provide a written description of the type of assistance, the company name, contact person and telephone number, and the name of the person who provided the assistance as well as that of the supplier that offered competitive pricing.
- h. Provide timely written notification - 20 points: Contractors are required to solicit in writing subcontract bids and material quotes from relevant M/WBEs at least two weeks prior to the bid opening. Relevant businesses are those that could feasibly provide the goods or services required to satisfy the terms specified in the county's solicitation. When soliciting

bids, quotes, and proposals, the contractor shall provide the project name, the bidder's name, subcontract items, primary contact person's name and phone number, information on the availability of plans and specifications, and the date on which the subcontractor's written bid shall be submitted to the prime contractor. Written notification shall include verification of the transmission date, the recipient's name, and the company name. Documentation shall also include facsimile transmittal confirmation slips or written confirmation of receipt via email with the date of transmission.

- (3) M/WBE prime contract bid discounts shall be applied to construction prime contracts. An eight percent bid discount on construction prime contracts shall be applied to African American and Asian American prime bidders, for a maximum discount of \$40,000.00. The bid discount shall be applied during the evaluation process. The discount shall lower the eligible M/WBE's bid, but shall not reduce the contract award amount. The solicitation shall describe the bid discount as applied to eligible M/WBE prime contractors. In order to qualify for the bid discount, the M/WBE prime contractor shall include in its bid a copy of the M/WBE certification approval letter issued by the M/WBE Program.
- (4) M/WBE prime contract bid discounts shall be applied to commodities and services prime contracts. An eight percent bid discount on commodities and services prime contracts shall be applied to African American and Caucasian Female prime bidders, for a maximum discount of \$40,000.00. The bid discount shall be applied during the evaluation process. In order to qualify for the bid discount, the M/WBE prime contractor shall include in its bid a copy of the M/WBE certification approval letter issued by the M/WBE Program.
- (5) M/WBE prime contract preference points shall be applied to professional services contracts. Thirteen percent preference points shall be assigned on professional services contracts during the evaluation process for African American, Asian American, and Hispanic American prime consultants. A copy of the prime consultant's M/WBE certification approval letter issued by the M/WBE Program shall be included with the proposal or statement of qualifications. The submission requirements to receive the preference points shall be specified in the solicitation.
- (6) A small prime contract program targeting African American and Asian American business shall be established for construction prime contracts valued under \$5,000.00. If no M/WBE bidder is found to be responsive, the bid shall be open to all available businesses. In the county's annual contract forecast and prior to its respective bid announcements, the administrator of purchasing shall identify construction items of work that can be unbundled into contracts valued under \$5,000.00 for M/WBE participation.

On informal bid solicitations for purchases valued at \$25,000.00 or less, the administrator of purchasing shall target the solicitations to certified M/WBE's. There must be at least two certified M/WBE's that provide the goods or services being procured. If no M/WBE is found to be responsive, then the county may solicit bids for the goods or services from all other vendors.

- (f) *M/WBE program certification* . Participants included in the race and gender-conscious provisions of the M/WBE Program must be certified by the EOC. M/WBE certification standards include eligibility criteria for ethnicity and gender, ownership and control, residency, and license.
 - (1) *Ethnic groups* . The qualifying ethnic groups shall include African Americans, Hispanic Americans, Asian Americans, and Native Americans.
 - (2) *Ownership and control* . An eligible minority business shall be a for-profit enterprise that is 51 percent or more owned and controlled by one or more minority persons.
An eligible woman business shall be a for-profit enterprise that is 51 percent or more owned and controlled by one or more women.
 - (3) *Residency and licensing* . An eligible business owner shall provide proof of being a resident of Shelby County for at least six months prior to the time of application for certification and have a physical business address located within the county and have continuously maintained the physical address for at least six months prior to the time of application. In addition, the business

shall be authorized to do business under the laws of the state, and eligible to do business in the county.

An exemption to the Shelby County residency requirement may be granted by the administrator of EOC to those eligible minority and/or women business owners who have operated the qualifying business within Shelby County for a minimum of ten years and employ a minimum of eight employees who are residents of Shelby County.

(4) *Certification process .*

- a. The EOC shall design, implement, and manage the M/WBE certification process. The certification program shall include reciprocity with local agencies that have an M/WBE certification program which comports with the County's standards.
- b. The principals of a business applying for certification shall certify under penalty of perjury that the information submitted to obtain certification was provided without collusion and that no violation of any federal or Tennessee antitrust laws had occurred.
- c. Additionally, the above-mentioned principles and businesses that knowingly falsify ownership and control of said business will be prohibited from conducting business with Shelby County Government for a minimum of three years after a thorough investigation and administrative hearing conducted by Shelby County Commission or an Ad Hoc Committee established by the Shelby County Commission and composed of individuals without a conflict of interest.
- d. If principals change ownership and control of their business under contract with Shelby County Government and active participant with rights and privileges conferred under this ordinance, said new principals must inform the EOC administrator. If after a change in ownership and control, and the new principal qualifies as minority or women owned and controlled business under this ordinance, said new principal shall certify with the EOC administrator and be subject to the same penalties mentioned in subsection (f)(4)b. and c.
- e. If the above-mentioned principals of an certified and reciprocally accepted M/WBE changes control and ownership while not under contract with Shelby County Government, said new principals and business must inform the EOC administrator before bidding on any business with Shelby County Government under this M/WBE section and subject to the same penalties in subsection (f)(4)b. and c..
- f. In the event that the EOC determines that the business is not eligible for the M/WBE certification, the written communication to the business shall include a detailed explanation for the denial.
- g. To appeal the denial, the business must submit a written request to the EOC within ten business days of receiving the denial notification.
- h. If the denial is not reversed, then the business may appeal the EOC's decision to the EOC appeals board within ten business days of receiving the denial notification. The members of the EOC appeals board are appointed by the chairman of the county commission. The decision of the EOC appeals board shall be final.

(g) *Rules and regulations .*

(1) *M/WBE Program Outreach .*

- a. An outreach campaign shall be conducted to promote the M/WBE Program. Press releases and public service announcements shall be disseminated to the media. Partnerships with local business organizations shall be established in order to foster collaborative opportunities by which to communicate with M/WBEs. An electronic newsletter shall be published announcing the M/WBE Program, and there shall be coordination with governments and agencies to maximize the dissemination of M/WBE Program information. The outreach campaign shall be conducted annually.

- b. Business community outreach efforts targeting M/WBEs shall be conducted to solicit bids, proposals, and statements of qualifications. M/WBEs shall be solicited for prime contracts in industries of construction, professional services, and commodities and services. Outreach to the identified M/WBEs shall be performed before the solicitation is released, to notify them of the upcoming opportunities. The formation of joint ventures, partnerships, and other similar arrangements among ethnic and gender groups shall be encouraged. All solicitations shall be posted on the county's website on a regular basis and on the same day(s) each week.
- c. Annually, each user department shall submit a forecast of contracts to be awarded within the year. User departments shall designate a staff member to serve as the M/WBE liaison to the administrator of purchasing and the EOC, and to assist in conducting the annual review. The user department's M/WBE liaison shall be responsible for identifying the upcoming procurement opportunities, along with the industry, the scope of the services or goods, and the estimated cost for each project.

The administrator of purchasing and the EOC shall review the M/WBE directory in collaboration with the user department's M/WBE liaison to determine which National Institute of Government Purchasing (NIGP) or Northern Industry Classification System (NAICS) codes meet the contract requirements. Outreach shall be conducted by the EOC to identify additional businesses in the appropriate industry classifications.

(2) *M/WBE program directory .*

- a. The equal opportunity compliance office shall update the electronic certification mailing list within ten days following the certification or recertification of an M/WBE. Within ten days following a decision by the EOC to revoke a business' M/WBE certification status, the mailing list shall be updated to reflect this change. The equal opportunity compliance office shall send digital copies of contracting opportunities, contract forecasts, requests for bids, requests for proposals, and requests for qualifications via the electronic mailing list. Any other digital message that a user department wants to transmit to certified businesses shall also be sent using the electronic mailing list.

Once a certification application is approved, the M/WBE's email address shall be auto-subscribed to the electronic mailing list. The EOC shall be responsible for updating and approving all communications disseminated through the electronic mailing list.

An electronic directory listing of M/WBEs certified by the county or an approved certifying agency shall be maintained by the EOC. The business listing shall include the company's name, contact person, contact information and NIGP or NAICS code. The M/WBE directory shall be updated monthly to reflect any new certifications or changes to existing certifications. The M/WBE directory shall be published on the County's Equal Opportunity Compliance webpage and downloadable in Microsoft Office Excel and Word format.

(3) *General M/WBE program procedures .*

- a. Performance bonds shall not be required on construction contracts where the engineer's project estimate is less than \$25,000.00.
- b. The consultant review committee shall be established by the county mayor and the Shelby County Board of Commissioners for the purpose of reviewing, screening, and ranking the selection of professional architects, engineers, appraisers, and other types of consultants responding to solicitations to perform work on public works projects.

Consultant review committee members shall not be actively engaged in professional consulting or employed by a design consulting business. Consultant review committee membership shall be comprised of representatives from the county or their designee and business community. There shall be five county representatives and four business community members.

- Director of public works
- Administrator of purchasing
- County engineer
- Director of administration and finance
- Director of the equal opportunity compliance office
- "Floating" representative from the user department, agency, or office of the elected official within whose jurisdiction the project is located
- Minority architecture and engineering professional, or other relevant professional with experience in a related field
- Female architecture and engineering professional, or other relevant professional with experience in a related field

Consultant review committee members who are county employees shall serve for the duration of their office, while the business members shall serve a two-year term. The Memphis Chapter of the American Institute of Architects and the Society of Professional Engineers shall make recommendations to the county mayor concerning the nomination of a professional architect or engineer to serve as a member of the consultant review committee. Architects, engineers, and other professional services providers may also apply to the consultant review committee for consideration and approval. The administrator of purchasing shall serve as or provide a secretary to the consultant review committee. All consultant review committee members shall be required to sign a conflict of interest statement to foster transparency in the county's procurement process.

The consultant review committee's recommendations shall be based upon criteria that include M/WBE subcontract goals and the number of the consultant's previous awards, in order to avoid repeated awards to highly used prime contractors. The selection process for award of professional services contracts shall include a written recommendation report providing the evaluation point assignment for each consultant. The recommendations shall rank all respondents and list the sub-consultant businesses included to meet the subcontract goal, along with the percent of their participation. A signed copy of each evaluator's scores and comments shall be attached to the report. The committee's written report shall be submitted to the administrator of purchasing and the county mayor for final selection.

- (4) A county contract compliance committee shall serve as an oversight working group to ensure that the rules and regulations set forth in this section are implemented as stated. The contract compliance committee's mission is threefold: (1) to advocate for M/WBE access to the county's procurement process, (2) review procurement procedures and policies that impact M/WBE participation, and (3) monitor M/WBE utilization on the county's contracts to ensure that all county departments, offices, boards and agencies adhere to the M/WBE program requirements.

The contract compliance committee shall have nine members. The committee staff shall include county managers and the business community members appointed by the Shelby County Board of Commissioners. The business members shall reflect the underutilized business populations as reported in the 2016 Legal Analysis and Disparity Study. The contract compliance committee members shall include:

- Chairman of the Shelby County Board of Commissioners or its designee
- Shelby County Board Commissioner

- County mayor or designee

The business committee members shall be representative the following associations:

- Latino Memphis
- National Association of Women Business Owners
- Mid-South Minority Business Continuum
- Black Business Association
- Minority Contractors Association
- Associated Builders and Contractors, West Tennessee Chapter

The administrator of the EOC shall serve as the secretary and voting member of the committee. The secretary shall submit a monthly compliance report listing utilization by department, MBE and WBE status, noncompliant departments, and noncompliant prime contractors. Public members of the contract compliance committee shall serve for a two year term. Members shall serve a maximum of three full two year terms.

- (5) As a prequalification criterion, a manufacturer doing business with the county shall have M/WBE distributors authorized to sell its product line at the regional or national level. The manufacturer shall provide its distributors' business information and verification of M/WBE certification on the prequalification questionnaire.
- (6) Payments to prime contractors shall be made within 15 days of the county receiving an undisputed invoice. Prime contractors shall be required to pay their subcontractors within ten days of receipt of their invoice payment from the county. The prime contractor shall be penalized if the subcontractor is not paid in a timely manner. All contracts with prime contractors shall include the following language:

The penalty for noncompliance with the ten-day timely payment to subcontractor(s) shall include:

- a. Any prime contractor who violates the timely payment term to a subcontractor more than once in a three-month period shall lose their EOC qualification number to do future business with the county for three months;
- b. Any prime contractor who violates the timely payment term to a subcontractor more than twice in a six-month period shall lose their EOC qualification number to do future business with the county for six months;
- c. Any prime contractor who violates the timely payment term to a subcontractor more than three times in an one-year period shall lose their EOC qualification number to do future business with the county for one-year.

The prime contractor may appeal the above imposed penalty to the EOC Appeals Board.

- (h) *Periodic review and sunset clause* . The factual basis upon which the race and gender-conscious provisions of the M/WBE Program are predicated shall be updated at least every five years. If, at the end of five years, the Shelby County Board of Commissioners finds that the purpose of this section has not been achieved, it may extend the effective date of the race and gender-conscious provisions of this section for an additional five years by majority vote of the Shelby County Board of Commissioners.
- (i) *Reporting* . A subcontract monitoring system shall be implemented by the county. M/WBE and non-M/WBE subcontracting participation shall be tracked electronically in the subcontract monitoring system. The system will include a relational database application that will allow the linking of

subcontractor data to the appropriate prime contract. Each prime contract shall be identified by industry classification using NIGP or NAICS codes and the procurement method. At the time of bid opening, computerized data entry forms shall capture the required information to produce the M/WBE utilization reports. All information that contractors enter into the subcontract monitoring system shall be reviewed by the EOC on a bi-weekly basis to ensure consistent contract compliance. A record of any discrepancies or proof of failure to comply with the contract goals and regulations shall be filed by the EOC. Customizable queries designed into the data monitoring system shall analyze the data necessary for producing the M/WBE Utilization Reports electronically.

The M/WBE Utilization Report shall include prime contract and subcontract awards and payments, categorized by industry and contractor, user department, contractor ethnicity, contractor gender, and certification status. Change orders and substitutions shall also be tracked and reported according to the categories of prime contract, user department name, project name, and the contractor's ethnicity and gender.

The M/WBE Utilization Report shall be submitted on a quarterly basis to the Shelby County Board of Commissioners. The fourth-quarter report shall include an assessment of M/WBE Program activities as well as recommendations for program enhancements. An acknowledgement of program accomplishments shall also be detailed in the M/WBE Utilization Report. The M/WBE Utilization Reports shall be posted on the M/WBE webpage and distributed electronically to registered vendors.

- (j) *On-site compliance review inspections* . Upon the submission of a written sworn compliant of noncompliance, the EOC may conduct an on-site inspection or desk audit of the project to determine whether the prime contractor has been utilizing the subcontractor in accordance with the contractual agreement for services. During the investigation period, the payment for services may be temporarily suspended pending the outcome of the investigation. The investigation process may take up to ten business days for completion.

(Ord. No. 472, §§ 1—10, 12-19-2016; Ord. No. 473, §§ 2, 6, 6-26-2017)

Item #: 23

Moved by: BROOKS

Prepared by: Shep Wilbun

Seconded by: JONES

Reviewed by: Marcy Ingram

ORDINANCE NO. 489

ORDINANCE TO AMEND ORDINANCE NO. 472, WHICH ESTABLISHED THE SHELBY COUNTY MINORITY AND WOMAN BUSINESS ENTERPRISE PROGRAM (M/WBE), TO MODIFY THE COMPOSITION OF THE: (1) CONSULTANT REVIEW COMMITTEE AND (2) CONTRACT COMPLIANCE COMMITTEE. SPONSORED COMMISSIONER VAN D. TURNER, JR.

WHEREAS, It is the policy of the Shelby County Government (County) as articulated in Articles II and V of the County's Charter (Charter) to implement a procurement program geared toward increasing the percentage of procurement dollars spent with Minority and Woman Business Enterprises (M/WBE) correlated to the availability level of M/WBEs operating within the County; and

WHEREAS, The 2016 Legal Analysis and Disparity Study conformed to the legal tenets set forth in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and its progeny, and it revealed statistically significant disparity in the County's award of construction and professional services contracts to available M/WBEs at both the prime contract and subcontract levels, and goods and services contracts to available M/WBEs at the prime contract level; and

WHEREAS, The Shelby County Board of Commissioners (County Commission) created the County's M/WBE program pursuant to Ordinance No. 472, adopted on December 19, 2016, to address the disparities identified in the findings of the 2016 Legal Analysis and Disparity Study; and

WHEREAS, The County shall be committed to using its spending power in a manner that promotes a robust and inclusive economy that fully utilizes all segments of its business population regardless of race or gender; and

WHEREAS, The County is committed to ensuring that all citizens of Shelby County participate in its economic growth and development and that no citizen be denied an opportunity to participate in the procurement of goods and services because of discrimination based on race or gender; and



WHEREAS, The County Commission desires to amend Ordinance No. 472, adopted on December 19, 2016, to modify the composition of the Consultant Review Committee and the Contract Compliance Committee.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF SHELBY COUNTY, TENNESSEE, That the following amendments to M/WBE Ordinance No. 472, adopted on December 19, 2016, are hereby promulgated, adopted and incorporated into the current policies and procedures for the Equal Opportunity Compliance Office (or EOC) to implement:

SECTION 7.

iii. General M/WBE Program Procedures

- a. Performance bonds shall not be required on construction contracts where the engineer's project estimate is less than \$25,000.00.
- b. The Consultant Review Committee (CRC) "REVIEW" shall be established by the County Mayor and the Shelby County Board of Commissioners for the purpose of reviewing, screening, and ranking the selection of professional architects, engineers, appraisers, and other types of consultants responding to solicitations to perform work on public works projects.

Consultant Review Committee members shall not be actively engaged in professional consulting or employed by a design consulting business. Consultant Review Committee membership shall be comprised of representatives from the County or their designee and business community. There shall be five six (6) County representatives and four three (3) business community members.

- Director of Public Works or his designee
- Administrator of Purchasing
- ~~County Engineer~~
- ~~Director of Administration and Finance~~
- EOC Chief Diversity Supplier Officer
- Chair of the Shelby County Board of Commissioners or his/her designee or chair of the EOC Committee or his/her designee
- Director of the Equal Opportunity Compliance Office
- "Floating" representative from the user department, agency, or office of the elected official within whose jurisdiction the project is located
- Two (2) minority architecture and engineering professionals or two (2) minority ~~other relevant~~ professionals with relevant experience in a related field
- Female architecture and engineering professional, or a female ~~other relevant~~ professional with relevant experience in a related field

Consultant Review Committee members who are County employees shall serve for the duration of their office, while the business members shall serve a two-year term. The Memphis Chapter of the American Institute of Architects and the Society of Professional Engineers National Organization of Minority Architects (NOMA) and/or the National Society of Black Engineers (NSBE) shall make recommendations to the County Mayor concerning the nomination of two (2) minority representatives to serve on the REVIEW committee as a professional architects and/or engineers. The Memphis Chapter of the American Institute of Architects and the Society of Professional Engineers shall make recommendations to the County Mayor concerning the nomination of a professional architect or engineer to serve as a female member of the Consultant Review Committee and, if no female representatives from NOMA or NSBE can be selected, then minority representatives can likewise be selected from these organizations. Architects, engineers, and other professional services providers may also apply to the Consultant Review Committee for consideration and approval. The Administrator of Purchasing shall serve as or provide a secretary to the Consultant Review Committee. All Consultant Review Committee members shall be required to sign a conflict of interest statement to foster transparency in the County's procurement process.

The Consultant Review Committee's recommendations shall be based upon criteria that include M/WBE subcontract goals and the number of the consultant's previous awards, in order to avoid repeated awards to highly used prime contractors. The selection process for award of professional services contracts shall include a written recommendation report providing the evaluation point assignment for each consultant. The recommendations shall rank all respondents and list the subconsultant businesses included to meet the subcontract goal, along with the percent of their participation. A signed copy of each evaluator's scores and comments shall be attached to the report. The Committee's written report shall be submitted to the Administrator of Purchasing and the County Mayor for final selection.

- iv. A County Contract Compliance Committee (CCC) "COMPLIANCE" shall serve as an oversight working group to ensure that the rules and regulations set forth in this Ordinance are implemented as stated. The Contract Compliance Committee's mission is threefold: (1) to advocate for M/WBE access to the County's procurement process, (2) review procurement procedures, and policies that impact M/WBE participation, and (3) monitor M/WBE utilization on the County's contracts to ensure that all County departments, offices, boards and agencies adhere to the M/WBE Program requirements.

The Contract Compliance Committee shall have nine eleven (11) members. The Committee staff shall include County managers and the business community members appointed by the Shelby County Board of Commissioners. The business members shall reflect the underutilized

business populations as reported in the 2016 Legal Analysis and Disparity Study. The Contract Compliance Committee members shall include:

- Chairman of the Shelby County Board of Commissioners or its designee
- Shelby County Board Commissioners' EOC Committee Chair
- County Mayor or designee
- Administrator of Equal Opportunity Compliance Office
- EOC Chief Diversity Supplier Officer

The business Committee members shall be representative the following associations:

- Latino Memphis or similar organization
- National Association of Women Business Owners or similar organization
- Mid-South Minority Business Continuum or similar organization
- Black Business Association or similar organization
- Memphis Area Minority Contractors Association
- Associated Builders and Contractors, West Tennessee Chapter or similar organization

The Administrator of the EOC shall serve as the secretary and ~~voting member~~ of the Committee. The secretary shall submit a monthly compliance report listing utilization by department, MBE and WBE status, non-compliant departments, and non-compliant prime contractors. Public members of the Contract Compliance Committee shall serve for a two year term. Members shall serve a maximum of three (3) full two year terms.

BE IT FURTHER ORDAINED, that the provisions of this ordinance are hereby declared to be severable, and if any of its sections, provisions, sentences, phrases, or parts be held unconstitutional or void, the remainder of this Ordinance shall continue in full force and effect, it being the legislative intent now hereby declared that this Ordinance would have been passed even if such unconstitutional or void matter had not been included herein.

BE IT FURTHER ORDAINED, That this Ordinance shall take effect 15 days after its passage, the public welfare requiring it.



Mark H. Luttrell Jr.
County Mayor

Date: 8-27-18

ATTEST:

Clerk of County Commission

FIRST READING: July 30, 2018

SECOND READING: August 8, 2018

ADOPTED
THIRD READING: August 13, 2018

CERTIFIED COPY

CLERK OF COUNTY COMMISSION

DATE 10/01/18

532

**SHELBY COUNTY BOARD OF COMMISSIONERS
MINUTE BOOK NO. 167**

REGULAR ADJOURNED SESSION FROM DECEMBER 3, 2018 TO DECEMBER 17, 2018

—

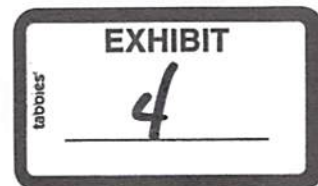
—

ITEM 38 (THIRD READING) (ADOPTED)

Ms. Hopson, Assistant County Attorney, announced Item 38, which is as follows:

ORDINANCE NO. 500

ORDINANCE TO AMEND ORDINANCE NO. 472, WHICH ESTABLISHED THE SHELBY COUNTY MINORITY AND WOMAN BUSINESS ENTERPRISE PROGRAM (M/WBE), TO AMEND THE FOLLOWING SECTIONS: (1) DEFINITIONS; (2) RACE AND GENDER-CONSCIOUS REMEDIES SECTION; AND (3) RULES AND REGULATIONS AND CORRESPONDING PURCHASING POLICIES FOR SHELBY COUNTY GOVERNMENT. SPONSORED BY CHAIRMAN VAN D. TURNER, JR.



SHELBY COUNTY BOARD OF COMMISSIONERS
MINUTE BOOK NO. 167

533

REGULAR ADJOURNED SESSION FROM DECEMBER 3, 2018 TO DECEMBER 17, 2018

"WHEREAS, It is the policy of the Shelby County Government (County), as articulated in Articles II and V of the County's Charter (Charter), to implement a procurement program geared toward increasing the percentage of procurement dollars spent with Minority and Woman Business Enterprises (M/WBE) correlated to the availability level of M/WBEs operating within the County; and

WHEREAS, The 2016 Legal Analysis and Disparity Study conformed to the legal tenets set forth in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and its progeny, and it revealed statistically significant disparity in the County's award of construction and professional services contracts to available M/WBEs at both the prime contract and subcontract levels, and goods and services contracts to available M/WBEs at the prime contract level; and

WHEREAS, The Shelby County Board of Commissioners (County Commission) created the County's M/WBE program pursuant to Ordinance No. 472, adopted on December 19, 2016, to address the disparities identified in the findings of the 2016 Legal Analysis and Disparity Study; and

WHEREAS, The County shall be committed to using its spending power in a manner that promotes a robust and inclusive economy that fully utilizes all segments of its business population regardless of race or gender; and

WHEREAS, The County is committed to ensuring that all citizens of Shelby County participate in its economic growth and development and that no citizen be denied an opportunity to participate in the procurement of goods and services because of discrimination based on race or gender; and

WHEREAS, The County Commission desires to amend Ordinance No. 472, adopted on December 19, 2016.

534

SHELBY COUNTY BOARD OF COMMISSIONERS
MINUTE BOOK NO. 167

REGULAR ADJOURNED SESSION FROM DECEMBER 3, 2018 TO DECEMBER 17, 2018

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF SHELBY COUNTY, TENNESSEE, That the following amendments to M/WBE Ordinance No. 472, adopted on December 19, 2016, are hereby promulgated, adopted and incorporated into the current policies and procedures for the Equal Opportunity Compliance Office (or EOC) to implement:

SECTION 2.

DEFINITIONS

(a) *Definitions.*

"Award" shall mean the selection of a vendor for a contract. Contract awards are made by the County to a prime contractor and by a prime contractor to a subcontractor.

"Bidder" shall mean any individual, company, or association seeking the award of a contract or subcontract on a project that is at least partially funded by the County.

"Commercially Useful Function" shall mean a subcontract fulfilled by a bidder responsible for the materials, supplies, and services used in the performance of the contract. To determine whether a subcontractor is performing a commercially useful function, the subcontracted work shall be evaluated with respect to normal industry practices, including whether the contracted amount that the subcontractor is to be paid is commensurate with the work that it is contracted to perform. The subcontractor does not perform a commercially useful function if its role is limited to being a participant in a contract through which funds are passed in order to convey the appearance of meaningful and useful subcontractor participation.

"Contract" shall mean a mutually binding legal relationship or any modification thereof obligating the vendor to furnish commodities or services, including construction and professional services, and the County or the County's prime contractor to pay for them.

SHELBY COUNTY BOARD OF COMMISSIONERS
MINUTE BOOK NO. 167

535

REGULAR ADJOURNED SESSION FROM DECEMBER 3, 2018 TO DECEMBER 17, 2018

“Control” shall mean the authority of an individual or business owner to sign responses to solicitations and contracts, to make price negotiation decisions, to sell or liquidate the business, and to direct the day- to-day business management and operations without interference from others.

“Eligible Purchase” shall mean all purchases made by purchase order or contract, excluding those with governmental or non-profit entities.

“Joint Venture, Consortium, and Partnership” shall mean a business entity that is formed to contract with Shelby County through the M/WBE Business Purchasing Program. The business entity shall have written documentation demonstrating that the eligible minority/women owned business as defined herein has a real, substantial, and continuing ownership interest of at least fifty-one percent (51%) and shall be responsible for the daily management and control of the project. The MWBE joint venture partner must solely complete specific discreet items of work. The scope of work should be a commercially useful function. Eligible Joint Venture can be counted toward the MWBE sub goals if the MWBE Joint Venture is part of the eligible group. EOC Administrator shall determine whether the Joint Venture is eligible under this section.

SECTION 5.

RACE AND GENDER-CONSCIOUS REMEDIES. The race and gender conscious remedies shall be met by the ethnic and gender groups that were found to have a statistically significant underutilization on the County's prime contracts and subcontracts. Race and gender-conscious subcontract goals, prime bid discounts, and evaluation preference points are the narrowly tailored remedies to address the documented statistical disparity. The subcontract goals are based on minority business enterprise (MBE) and woman business enterprise (WBE) availability.

1. Based on availability, the construction subcontract goal shall be 28 percent for MBEs and the professional services subcontract goal shall be 26 percent for MBEs and 14 percent for WBEs. The goals will be applied on a project by project basis as determined by the rules set forth by the EOC Administrator.

536

SHELBY COUNTY BOARD OF COMMISSIONERS
MINUTE BOOK NO. 167

REGULAR ADJOURNED SESSION FROM DECEMBER 3, 2018 TO DECEMBER 17, 2018

2. The construction subcontract goal shall be met by African American businesses and the professional services subcontract goal shall be met by African American businesses and Caucasian Female businesses. The construction subcontract goal shall be applied to requests for bids, and the professional services subcontract goals shall be applied to requests for proposals as well as requests for statements of qualifications. Proof of subcontract participation shall be submitted at the time of bid opening and documented on the subcontractor utilization plan. If a bidder fails to meet the solicitation's subcontract goals, the bidder can provide evidence of a good faith effort to meet the goal. A bid that does not meet the subcontract goals or provide evidence of a good faith effort will be deemed non-responsive and therefore ineligible for award. The subcontractor utilization plan shall be reviewed at the time of bid opening for subcontractor goal compliance, verification of subcontractor certification, and evidence that the subcontractor shall perform a commercially useful function. Prime contractors are prohibited from having an exclusive relationship with M/WBE subcontractors.

Good faith effort elements shall be quantified to determine whether a prime contractor has provided evidence of a good faith effort to meet the M/WBE subcontract goals. Good faith efforts review and determination shall be conducted by the Chief Diversity Supplier Officer and the Administrator of Purchasing. If no agreement can be reached, the Administrator of EOC makes the final decision. Good faith effort elements shall be quantified to determine whether a prime contractor has provided evidence of a good faith effort to meet the M/WBE subcontract goals. In order to be considered a responsive bidder, the prime contractor must demonstrate a sufficient good faith effort to achieve a minimum score of 80 percent of the required points. The point assignments and requirements to document evidence of good faith efforts are as follows:

- (1) M/WBE prime contract bid discounts shall be applied to construction prime contracts. A ten percent (10%) bid discount on construction prime contracts shall be applied to African American and Asian American prime bidders, for a maximum discount of \$50,000.00. The bid discount shall be applied during the evaluation process. The discount shall lower the eligible M/WBE's bid, but shall not reduce the contract award amount. The solicitation shall describe the bid discount as applied to eligible M/WBE prime contractors. In order to qualify for the bid discount, the M/WBE prime contractor shall include in its bid a copy of the M/WBE certification approval letter issued by the M/WBE Program.
- (2) M/WBE prime contract bid discounts shall be applied to commodities and services prime contracts. A ten percent (10%) bid discount on commodities and services prime contracts shall be applied to African American and Caucasian Female prime bidders, for a maximum discount of \$50,000.00. The bid discount shall be applied during the evaluation process. In order to qualify for the bid discount, the M/WBE prime contractor shall include in its bid a copy of the M/WBE certification approval letter issued by the M/WBE Program.
- (3) MWBE prime contract preference points shall be applied to professional services contracts. Fifteen percent (15%) preference points shall be assigned on professional services contracts during the evaluation process for African American, Asian American, and Hispanic American prime consultants. A copy of the prime

SHELBY COUNTY BOARD OF COMMISSIONERS
MINUTE BOOK NO. 167

537

REGULAR ADJOURNED SESSION FROM DECEMBER 3, 2018 TO DECEMBER 17, 2018

consultant's M/WBE certification approval letter issued by the M/WBE Program shall be included with the proposal or statement of qualifications. The submission requirements to receive the preference points shall be specified in the solicitation. The Consultant Review Committee (CRC) shall recommend to the Mayor the Vendor deemed "lowest most responsive and responsible bidder".

- (4) A small prime contract program targeting African American and Asian American business shall be established for construction prime contracts valued under \$5,000.00. If no M/WBE bidder is found to be responsive, the bid shall be open to all available businesses. In the County's annual contract forecast and prior to its respective bid announcements, the administrator of purchasing and the EOC shall identify construction items of work that can be unbundled into contracts valued under \$5,000.00 for M/WBE participation.

On informal bid solicitations for purchases valued at \$25,000.00 or less, the Administrator of Purchasing shall target the solicitations to certified M/WBE's. There must be at least two certified M/WBE's that provide the goods or services being procured. If no M/WBE is found to be responsive, then the County may solicit bids for the goods or services from all other vendors.

Residency and Licensing

An exemption to the Shelby County residency requirement may be granted by the Administrator of EOC to those eligible minority and/or women business owners who have operated the qualifying business within Shelby County for a minimum of two (2) years and employ a minimum of three (3) employees who are residents of Shelby County.

SECTION 7.

RULES AND REGULATIONS

iii. General M/WBE Program Procedures

- a. Performance bonds shall not be required on construction contracts where the engineer's project estimate is less than \$25,000.
- b. The Consultant Review Committee (CRC) "REVIEW" shall be established by the County Mayor and the Shelby County Board of Commissioners for the purpose of reviewing, screening, and ranking the selection of professional architects, engineers, appraisers, and other types of consultants responding to solicitations to perform work on public works projects.

Consultant Review Committee members shall not be actively engaged in professional consulting or employed by a design consulting business. Consultant Review Committee membership shall be comprised of representatives from the County or their designee and business community. There shall be six.

538

**SHELBY COUNTY BOARD OF COMMISSIONERS
MINUTE BOOK NO. 167**

REGULAR ADJOURNED SESSION FROM DECEMBER 3, 2018 TO DECEMBER 17, 2018

- Director of Public Works or his designee
- Administrator of Purchasing
- Director of the Equal Opportunity Compliance Office
- Chief Diversity Supplier Officer
- EOC Chair or his/her designee
- "Floating" representative from the user department, agency, or office of the elected official within whose jurisdiction the project is located
- Two (2) minority architecture and engineering professionals or two (2) minority professionals with relevant experience in a related field
- Female architecture and engineering professional, or a female professional with relevant experience in a related field

Consultant Review Committee members who are County employees shall serve for the duration of their office, while the business members shall serve a two-year term. The Memphis Chapter of the National Organization of Minority Architects (NOMA) and/or the National Society of Black Engineers (NSBE) shall make recommendations to the County Mayor concerning the nomination of two (2) minority representatives to serve on the REVIEW committee as professional architects and/or engineers. The Memphis Chapter of the American Institute of Architects and the Society of Professional Engineers shall make recommendations to the Administrator of Purchasing who will forward the CRC recommendations to the County Mayor concerning the nomination of a professional architect or engineer to serve as a female member of the Consultant Review Committee and, if no representatives from NOMA or NSBE can be selected, then minority representatives can likewise be selected from these organizations. Architects, engineers, and other professional services providers may also apply to the Consultant Review Committee for consideration and approval. The Administrator of Purchasing shall serve as or provide a secretary to the Consultant Review Committee. All Consultant Review Committee members shall be required to sign a conflict of interest statement to foster transparency in the County's procurement process.

The Consultant Review Committee's recommendations shall be based upon criteria that include M/WBE subcontract goals and the number of the consultant's previous awards; in order to avoid repeated awards to highly used prime contractors. The selection process for award of professional services contracts shall include a written recommendation report providing the evaluation point assignment for each consultant. The recommendations shall rank all respondents and list the sub consultant businesses included to meet the subcontract goal, along with the percent of their participation. A signed copy of each evaluator's scores and comments shall be attached to the report. The Committee's written report shall be submitted to the Administrator of Purchasing and the County Mayor for final selection.

- iv. A County Contract Compliance Committee (CCC) "COMPLIANCE" shall serve as an oversight-working group to ensure that the rules and regulations set forth in this Ordinance are implemented as stated. The Contract Compliance Committee's

SHELBY COUNTY BOARD OF COMMISSIONERS
MINUTE BOOK NO. 167

539

REGULAR ADJOURNED SESSION FROM DECEMBER 3, 2018 TO DECEMBER 17, 2018

mission is threefold: (1) to advocate for M/WBE access to the County's procurement process, (2) review procurement procedures and policies that impact M/WBE participation, and (3) monitor M/WBE utilization on the County's contracts to ensure that all County departments, offices, boards and agencies adhere to the M/WBE Program requirements.

The Contract Compliance Committee shall have eleven (11) members. The Committee staff shall include County managers and the business community members appointed by the Shelby County Board of Commissioners. The business members shall reflect the underutilized business populations as reported in the 2016 Legal Analysis and Disparity Study. The Contract Compliance Committee members shall include:

- Chairman of the Shelby County Board of Commissioners or its designee
- Shelby County Board of Commissioners' EOC Committee Chair or designee
- County Mayor or designee
- Administrator of Equal Opportunity Compliance Office
- EOC Chief Diversity Supplier Officer

The business Committee members shall be representative of the following associations:

- Latino Memphis or similar organization
- National Association of Women Business Owners or similar organization
- Mid-South Minority Business Continuum or similar organization
- Black Business Association or similar organization
- Memphis Area Minority Contractors Association
- Associated Builders and Contractors, West Tennessee Chapter or similar Organization

The Administrator of the EOC shall serve as the secretary of the Committee. The secretary shall submit a monthly compliance report listing utilization by department, MBE and WBE status, non-compliant departments, and non-compliant prime contractors. Public members of the Contract Compliance Committee shall serve for a two-year term. Members shall serve a maximum of three (3) full two-year terms.

- (1) As a prequalification criterion, a manufacturer doing business with the County shall have M/WBE distributors authorized to sell its product line at the regional or national level. The manufacturer shall provide its distributors' business information and verification of M/WBE certification on the prequalification questionnaire.
- (2) Payments to prime contractors shall be made within 15 business days of the County Department/Elected Official receiving an undisputed invoice. Prime

540

**SHELBY COUNTY BOARD OF COMMISSIONERS
MINUTE BOOK NO. 167**

REGULAR ADJOURNED SESSION FROM DECEMBER 3, 2018 TO DECEMBER 17, 2018

contractors shall be required to pay their subcontractors within ten days of receipt of their invoice payment from the County. The prime contractor shall be penalized if the subcontractor is not paid in a timely manner. All contracts with prime contractors shall include the following language:

The penalty for noncompliance with the ten-day timely payment to subcontractor(s) shall include:

- a. Any prime contractor who violates the timely payment term to a subcontractor more than once in a three-month period shall lose their EOC qualification number to do future business with the County for three months;
- b. Any prime contractor who violates the timely payment term to a subcontractor more than twice in a six-month period shall lose their EOC qualification number to do future business with the County for six months;
- c. Any prime contractor who violates the timely payment term to a subcontractor more than three times in a one-year period shall lose their EOC qualification number to do future business with the County for one-year.

The prime contractor may appeal the above-imposed penalty to the EOC Appeals Board.

BE IT FURTHER ORDAINED, That the provisions of this Ordinance are hereby declared to be severable, and if any of its sections, provisions, sentences, phrases, or parts be held unconstitutional or void, the remainder of this Ordinance shall continue in full force and effect, it being the legislative intent now hereby declared that this Ordinance would have been passed even if such unconstitutional or void matter had not been included herein.

BE IT FURTHER ORDAINED, That this Ordinance shall take effect 15 days after its passage, the public welfare requiring it."

/s/ Lee Harris.
County Mayor

Date: December 27, 2018

ATTEST:

/s/ Rosalind Nichols
Clerk of County Commission

SHELBY COUNTY BOARD OF COMMISSIONERS
MINUTE BOOK NO. 167

541

REGULAR ADJOURNED SESSION FROM DECEMBER 3, 2018 TO DECEMBER 17, 2018

FIRST READING: November 19, 2018

SECOND READING: December 3, 2018

AS AMENDED
THIRD READING: December 12, 2018

AS ADOPTED
THIRD READING: December 17, 2018

Commissioner Brooks moved approval of the Ordinance on Third Reading; duly seconded by Commissioner Turner.

Discussion ensued amongst the Commission.

Chairman Turner Made a Motion to Suspend the Rules; duly seconded by Commissioner Jones.

Chairman Turner Made a Motion to Substitute; duly seconded by Commissioner Jones.

Discussion ensued amongst the Commission.

The Clerk called the roll for casting of the vote with the following results:

AYES: Jones, Sawyer, Whaley, Milton, Wright, Brooks, Ford, Lowery and Turner.

NAYS: Bradford and Mills.

ABSTENTION: Morrison.

ABSENT: None.

AYES, nine; NAYS, two; ABSENT, none (Billingsley absent during roll call).

Chairman Turner declared the MOTION CARRIED ON THIRD READING.

JS 44 (Rev. 08/18)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

MECHANICAL CONTRACTORS ASSOCIATION OF MEMPHIS, INC.;
WHITE PLUMBING & MECHANICAL CONTRACTORS, INC. and
MORGAN & THORNBURG, INCORPORATED

(b) County of Residence of First Listed Plaintiff Shelby

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

John Barry Burgess, McNabb, Bragorgos, Burgess & Sorin
81 Monroe Avenue, 6th Fl., Memphis, TN 38103
901-624-0640

DEFENDANTS

SHELBY COUNTY TENNESSEE; CAROLYN S. WATKINS and
JOHN & JANE DOES 1-15

County of Residence of First Listed Defendant _____

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395f) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input checked="" type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609				

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 USC §1981, 1983 and 2000(d)

Brief description of cause:
Defendants' violation of equal protection in contracting

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$
500,000.00

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE

1-17-19

SIGNATURE OF ATTORNEY OF RECORD

John Barry Burgess

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

_____ District of _____

Plaintiff(s)

v.

Defendant(s)

)
)
)
)
)
)
)
)
)
)
)

Civil Action No. _____

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* _____
 was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____
 _____ on *(date)* _____; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
 _____, a person of suitable age and discretion who resides there,
 on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
 designated by law to accept service of process on behalf of *(name of organization)* _____
 _____ on *(date)* _____; or

☐ I returned the summons unexecuted because _____; or

☐ Other *(specify)*: _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Civil Action No. _____

PROOF OF SERVICE*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* _____
 was received by me on *(date)* _____ .

☐ I personally served the summons on the individual at *(place)* _____
 _____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
 _____ , a person of suitable age and discretion who resides there,
 on *(date)* _____ , and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____ , who is
 designated by law to accept service of process on behalf of *(name of organization)* _____
 _____ on *(date)* _____ ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*: _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc: